

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Implementation of the Pay Telephone)
Reclassification and Compensation)
Provisions of the Telecommunications)
Act of 1996)

CC Docket No. 96-128

REPLY COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL
ON THE RBOC/GTE/SNET COALITION'S
PETITION FOR CLARIFICATION

Pursuant to the Common Carrier Bureau's Public Notice, DA 99-862, released April 15, 1999, the American Public Communications Council ("APCC") submits the following reply comments on the RBOC/GTE/SNET Payphone Coalition's petition for clarification of the per-call compensation requirement of the Payphone Orders ("Petition").¹ The RBOC/GTE/SNET Coalition requests a ruling, on a going-forward

¹ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd 20541 (1996), recon., 11 FCC Rcd at 21233 (1996) ("Payphone Order Reconsideration") (together the "Payphone Orders"), affirmed in part and vacated in part Illinois Public Telecom. Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997); Second Report and Order, 13 FCC Rcd 1778 (1997), remanded, MCI Telecomm. Corp. v. FCC, No. 97-1675 (D.C. Cir. May 15, 1998); Third Report and Order and Order on Reconsideration of the Second Report and Order, FCC 99-7, released February 4, 1999, petitions for reconsideration and review pending. See also Memorandum Opinion and Order, DA 98-642, released April 3, 1998 ("April 3 Order").

basis, that the carrier responsible for paying per-call compensation is “the entity identified by the Carrier Identification Code (‘CIC’) used to route the compensable call from the Local Exchange Carrier’s network.” Petition at 2.

DISCUSSION

I. THE COMPENSATION SYSTEM IS NOT FUNCTIONING EFFECTIVELY

Congress directed the FCC to establish a system of fair compensation for “each and every” payphone call because the market was not functioning so as to ensure fair compensation or an adequate supply of payphones. 47 U.S.C. § 276(b). In order to establish an effective system of compensation, the Commission must recognize the fundamental point that carriers have no market incentive to compensate payphone service providers (“PSPs”) for dial-around² calls. Because PSPs are forbidden from blocking the calls, carriers do not face any significant marketplace consequences if they fail to pay compensation. PSPs have no effective leverage (other than court actions for collection) to make carriers pay on time in the correct amounts. Accordingly, in order to carry out the Congressional intent, the compensation rules must be clearcut and simple to administer, and must not place unnecessary obstacles in the way of collection of compensation. As the comments demonstrate conclusively, the current system as implemented by carriers does not satisfy these criteria.

² “Dial-around” calls are coinless calls for which the PSP does not collect compensation pursuant to a contract with the carrier to which the call is routed.

The comments, mostly submitted by interexchange carriers (“IXCs”) that oppose the Coalition’s petition, provide a clear demonstration of some of the problems with the current compensation system as implemented by carriers.

First, the comments confirm APCC’s experience that different carriers and resellers are following inconsistent approaches to determining which carrier is responsible for paying the compensation for a given call. APCC at 6. AT&T indicates that it is following the Coalition’s recommended approach of assigning compensation responsibility to the carrier that is assigned the carrier identification code (“CIC”) used to route the call. International Telecard Association (“ITA”) states the view that, under the Commission’s decisions, the owner of the first switch to which a payphone call is routed has responsibility to pay compensation.³ Sprint, by contrast, claims that the appropriate compensation payer is “the carrier that is responsible for switching the call to the intended recipient of the call,” i.e., “the last carrier to whom the call is switched”. Sprint at 3, n. 4. MCI Worldcom (“MCI”) argues that it is the carrier “that ha[s] the ability to determine whether a call originated from a payphone, whether an access code has been used to make the call, and whether a call has been completed” that is responsible for paying compensation. MCI at 2. Finally, Cable & Wireless (“C&W”) contends that “the carrier responsible for per-call compensation is the carrier with switching capability that also is the primary economic beneficiary, i.e., the carrier that retains the caller as its own customer.” C&W at 3.⁴

³ The RBOC Coalition contends that under the current rule, the compensation payer is the owner of the first switch unless a switch-based reseller customer identifies itself to the carrier and the PSP as responsible for paying the compensation.

⁴ C&W also contends that, where the primary beneficiary is a switchless reseller, the reseller has an *indirect* compensation obligation, i.e., an obligation to reimburse the underlying switch-based carrier that compensates the PSP on the switchless reseller’s behalf. C&W at 2.

This divergence of views among carriers on where the payment obligation falls is causing severe problems for the collection of compensation. Naturally, because carriers lack any incentive to voluntarily compensate PSPs, each carrier tends to favor an interpretation of the compensation rule that places payment responsibility on some other carrier. The comments also raise doubts whether carriers are even consistently following practices that correctly reflect their own views as to who is the responsible payer. For example, MCI states that it identifies which of its customers are “facilities-based resellers” subject to compensation obligations “based on the service purchased by the reseller.” MCI at 6. According to MCI, “if the service includes use of a switch, the reseller is facilities-based, and subject to payphone compensation for compensable calls” *Id.* Yet the MCI marketing information attached to the Telecommunications Resellers Association’s (“TRA”) comments suggests that MCI offers “the use of its state-of-the-art network,” including “switched services” to meet the needs of “Switchless Resellers.” TRA, Att. A, first unnumbered page. MCI does not explain how it differentiates service that “include use of a switch” from “switched services” for purposes of distinguishing between “facilities-based resellers” and “switchless resellers.” Further, MCI does not explain why it classifies customers as switch-based resellers based solely on the MCI services used, without input from the customer itself. Even end users buying carriage from MCI could be using a switch to terminate traffic.

The confusion and diversity of positions indicated by the carriers’ comments reflects APCC’s actual experience in attempting to collect compensation. As the record in this proceeding demonstrates, major carriers are declining to pay compensation on some 20%-25% of the calls identified by their tracking systems as compensable payphone calls. APCC at 5; Ex Parte letter to Lawrence E. Strickling from Richard Juhnke, Sprint, December 4,

1998, at 2 (attached to Sprint's comments). When challenged, these carriers assert that another carrier farther up the chain is responsible for payment. As noted in its initial comments, APCC has sued seven resellers and is pursuing pre-litigation discussions with numerous others. In this process, it is a frequently recurring experience that, while the facilities-based carrier claims that its customers is a switch-based reseller and is responsible for paying compensation, the customer, when contacted, claims that the facilities-based carrier is the responsible party.⁵

An even greater problem is the difficulty of collecting compensation, in the correct amount, from hundreds of resellers with whom PSPs have no business relationship. As noted in APCC's comments in 1998, APCC contacted some 1,200 carriers to request payment of compensation on behalf of APCC clearinghouse clients. APCC received responses from less than 400 carriers and thus far has collected some amount of compensation from a total of 73. While some switch-based carriers indicate they would be willing to assist PSPs in identifying facilities-based resellers (C&W at 8-9; MCI at 3, Sprint at 5-6), the assistance actually provided to date by facilities-based carriers has been little or none in virtually all cases. Further the carriers disclaim any responsibility to inform PSPs how many calls they have routed to each reseller – a critical piece of information for appropriate allocation of resources in the collection process and uniquely known by the facilities-based carrier.

⁵ As used in these reply comments, the term "facilities-based carrier" means the IXC that owns the point of presence ("POP") to which the call is initially routed upon leaving the local exchange network. Resellers with switching capability that subsequently handle the call are referred to as "switch-based resellers."

Even when PSPs successfully “track down” switch-based resellers, they face serious difficulties in collecting compensation. The resellers typically has no business reason to pay the PSP. Further, the resellers may not have tracked calls -- or may not even exist any more. APCC spent nine months negotiating with a facilities-based carrier over identification of resellers. When identifying information was finally obtained, one of the largest resellers identified proved to have gone out of business, making it impossible to collect the compensation owed.

II. THE COMMISSION SHOULD IMMEDIATELY ISSUE A NOTICE OF RULEMAKING TO SIMPLIFY THE COMPENSATION PROCESS

In light of the current problems with assignment of compensation payment responsibility, the Commission should immediately begin a rulemaking to simplify the payment system. A rulemaking is necessary for two reasons. First, the Commission needs to settle on a workable system even if that system is not the one currently mandated.⁶ Second, the Commission needs to put to rest any doubts as to the payment functions and how they operate. That is best accomplished by a rulemaking, which should be commenced without delay.

The key criteria of a workable compensation rule include: (1) clear delineation of compensation payment responsibilities; (2) limitation of payment responsibility to a

⁶ APCC does not concede that the unworkable “system” embodied in certain IXC’s interpretations is authorized by the existing rules. However, a rulemaking will provide a more certain means of establishing a workable system.

manageable group of payers; and (3) timely availability to PSPs of information needed to identify responsible payers.

As shown above, the current “system” followed by MCI, Sprint and other carriers does not satisfy any of these criteria. Instead, it imposes excessive and unnecessary collection costs and uncollectibles on PSPs. These costs are properly recoverable in the compensation rate and must lead to a substantially increased rate if the Commission does not act to improve the system. Indeed, in the Third Report and Order the Commission rejected PSP requests – opposed by some of the same carriers who now oppose improvement in the payment system -- to include collection costs and uncollectibles specific to dial-around compensation in the calculation of the cost-based compensation rate. Third Report and Order, ¶¶ 162, 164. The Commission expressly acknowledged that, depending on the outcome of the RBOCs’ request for clarification of payment responsibility, it may need to revisit the issue of uncollectibles. Id., ¶ 162.

A number of alternatives have been proposed that would be more consistent with the principles of a workable payment system than the “system” described in Section I. One alternative is the approach suggested by the RBOC Coalition, in which the carrier with payment responsibility would be the carrier assigned to the CIC used to route the call. Another alternative that should be considered is to assign payment responsibility to the IXC that controls the first switch to which a call is routed after leaving the network of the originating LEC(s). Both these approaches deserve consideration. Either would be an improvement over the current process followed by IXCs, because they would provide certainty in the identification of payers and would substantially reduce the number of entities that would need to be involved in tracking calls and paying compensation.

However, regardless of the system adopted, the Commission must ensure that the third criterion of a workable rule is also satisfied. Information must be available on a nondiscriminatory basis to enable PSPs to find and collect payment from responsible payers. For example, IXC's must be required to cooperate fully in identifying any customers who are responsible payers (See April 3 Order, ¶ 38), and LECs should be required to make available to PSPs on the same terms and in the same manner all information (e.g., toll-free numbers, call detail, and complete carrier identifying information associated with each toll-free number) that is available to the LEC's own payphone operation.

Some IXC's oppose the alternatives described above on the grounds that the "first switch" carrier or the "CIC" carrier would not always be in a position to determine whether the call is completed. This is unlikely to be a major problem. For calls "completed" to resellers, compensation payments could be adjusted in accordance with average completion ratios established based on industry experience.

Other IXC's oppose these alternatives on the grounds that it would require a carrier that is not the "primary beneficiary" of the call to assume payment responsibility. However, all carriers benefit from payphone calls.

Other IXC's oppose the alternatives described above on the grounds that they would force IXC's to become PSPs' collection agents" for compensation that is properly the responsibility of resellers. However, facilities-based IXC's are already involved with reseller compensation. Under the current IXC interpretations, the facilities-based IXC determines in the first instance whether a payphone call reaching its network is compensable by the facilities-based IXC or by its reseller customer. Further, the facilities-based carrier already acts as "collection agent" for its "switchless reseller" customers. Under the alternatives described above, the facilities-based IXC's who have not done so would simply also assume

payment responsibility for the other payphone calls reaching their networks, or routed to their CICs, *i.e.*, the calls routed to “switch-based resellers.” Further, the facilities-based carrier is already involved because only the facilities-based carrier can effectively identify those of its customers who are responsible for paying compensation. Under the current system, PSPs must follow a two-step (at best) process in order to collect compensation from resellers – first contacting the facilities-based carriers, and then using information obtained from the carrier to locate and demand payment from the reseller-customer. As noted above, the process is inherently inefficient because of the number of resellers involved, the delays⁷ and difficulty in finding them, and the PSPs’ lack of any leverage whatsoever to facilitate collection from resellers.

Facilities-based carriers, by contrast, should have little difficulty recovering from their reseller customers the compensation payments made “on their behalf.” Facilities-based carriers already pay, and presumably recover, the compensation paid “on behalf of” switchless resellers (just as they apply “payphone surcharges” to recover compensation payments made for payphone calls routed to other customers). Recovery of compensation payments is relatively painless for facilities-based carriers because carriers already have a business relationship with their customers. Thus, it is not difficult for carriers to track calls, identify customers and exercise leverage in order to recover compensation payment charges imposed by tariff or contract must be paid or service will be cut off. PSPs, by contrast, have no customer relationship with resellers, and therefore no independent means of locating

⁷ As mentioned above, some resellers go out of business before PSPs can catch up with them to demand payment.

resellers tracking the calls they receive and exercising leverage over them. This would greatly simplify the payment system.

Thus, placing payment responsibility on the facilities-based carrier would greatly improve the efficiency of the compensation payment system, thereby reducing collection costs and avoiding the substantial rate increase that would be required in order to recover costs incurred under the existing payment “system.”

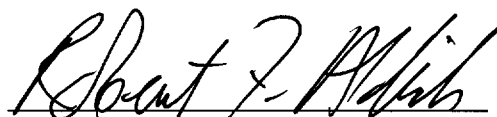
III. PENDING ADOPTION OF A NEW RULE, THE COMMISSION SHOULD CLARIFY PAYMENT RESPONSIBILITIES UNDER THE EXISTING RULE

Pending the adoption of a rule mandating a simplified payment system, the Commission can and must clarify carriers’ payment and information disclosure responsibilities under the existing rule. The Commission should make clear which carrier is currently responsible for payment – the “first switch” carrier, the “last switch” carrier, the CIC carrier, or an intermediate carrier. Further, the Commission must make clear whether a carrier can disclaim payment responsibility in favor of its customer when the service provided to the customer does not pass through Flex ANI and other information necessary to identify payphone calls. In addition, the Commission must clarify that, when a facilities-based carrier determines it is not responsible for payment because its customer is responsible, the facilities-based carrier must fully identify the customer, providing the customer’s name, address, telephone number, contact person, and associated toll-free number(s). MCI Worldcom and Sprint both acknowledge that this information should be

available.⁸ In addition, the carrier must provide the volume of calls delivered to each of that customer's toll-free numbers from each payphone ANI.

Dated: June 1, 1999

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich", written over a horizontal line.

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⁸ A rulemaking is not necessary to implement this requirement, as Sprint claims. The requirement is already implicit in carriers' existing compensation obligations, as the Bureau recognized in the April 3 Order.

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 1999, a copy of the foregoing Reply Comments of the American Public Communications Council on the RBOC/GTE/SNET Payphone Coalition's Petition for Clarification was delivered by first-class U.S. Mail, postage pre-paid to the following parties:

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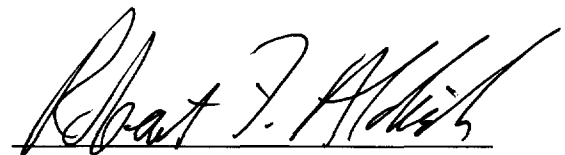
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